

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

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| TDS Metrocom, LLC, |) | |
| |) | |
| v. |) | |
| |) | |
| Illinois Bell Telephone Company |) | Docket No. 03-0553 |
| |) | |
| Complaint concerning imposition of |) | |
| unreasonable and anti-competitive termination |) | |
| charges by Illinois Bell Telephone Company. |) | |

**TDS METROCOM, LLC’S RESPONSE TO
SBC ILLINOIS’ MOTION TO STRIKE**

Illinois Bell Telephone Company (“SBC Illinois” or “SBC”) has moved to strike Question and Answer 12 in the Rebuttal testimony of Matthew Loch on behalf of TDS Metrocom (TDS Metrocom Ex. 1.5), on the grounds that (i) it is outside the scope of the allegations of, and relief requested in, TDS Metrocom’s complaint in this case, and (ii) it is not proper rebuttal. For the reasons given in this Response, the motion to strike should be denied.

1. Question and Answer 12 of Mr. Loch’s rebuttal testimony are as follows:

Q. Are there any other aspects of the ASCENT decision that are important to the issues in this case?

A. Yes. Finding (10) of the ASCENT order provided as follows:

“[C]alculation of a termination charge, pursuant to the formula described in Finding (9), should be performed by Ameritech upon termination of service by the customer or upon oral or written request from a customer, whichever occurs first; when such calculation is requested by a customer, it should be performed, and the results communicated to the customer, within three business days; the customer should be permitted to designate a telecommunications services provider as an agent for the purpose of requesting and receiving such calculation; in the event of a

dispute with respect to such calculation, the burden of proving the correctness of the calculation should lie with Ameritech.”

Regardless of the form of termination penalty that the Commission orders in this case, or even if the Commission agrees with SBC and does not mandate any particular form of termination charge, it is important that SBC be required to continue to provide timely calculations of termination charges to customers and, with proper customer authorization, to other telecommunications carriers. A competitive local exchange carrier such as TDS Metrocom has absolutely no chance to compete with SBC Illinois for the business of a customer that SBC has signed to a long-term contract if we cannot obtain timely termination charge calculations from SBC. Again, TDS Metrocom is only requesting that SBC Illinois be required to provide termination charge calculations to competing suppliers if authorized to do so by the customer, as specified in Finding (10) of the *ASCENT* order.

2. SBC Illinois asserts that the relief requested by TDS Metrocom in its Complaint in this case did not include a request that SBC be required to provide timely calculations of the termination charges that a customer would owe on its contract with SBC, to a competitive local exchange carrier (“CLEC”) that has authorization from the customer to receive that calculation, as SBC was directed to do in Finding (10) of the Commission’s Order in Docket 00-0024 (the “*ASCENT*” case).¹ (SBC Motion, ¶3) TDS Metrocom submits that it is abundantly clear from the Complaint that TDS Metrocom is complaining that SBC was failing to follow the directives of the *ASCENT* Order with respect to the termination charge provisions in SBC’s multi-year contracts with non-residential customers. SBC Illinois does not dispute, nor could it, that in the *ASCENT* Order the Commission directed SBC to provide calculations of termination charges remaining on customers’ contracts to CLECs that have proper authorization from the customer, as part of the overall relief granted and requirements imposed by the Commission in that case.

3. More specifically, however, TDS Metrocom’s Complaint did not contain an explicit request that SBC be directed to provide termination charge calculations in accordance

¹Finding (10) of the *ASCENT* Order is quoted in its entirety in Answer 12 of Mr. Loch’s rebuttal testimony, as quoted in paragraph 1 above.

with Finding (10) of the *ASCENT* Order because at the time the Complaint was filed, TDS Metrocom was unaware that SBC Illinois was intending to discontinue its practice of providing termination charge calculations to CLECs that had proper customer authorization (*i.e.*, in the manner described in Finding (10) of the *ASCENT* Order). Indeed, as can be seen from paragraphs 17, 20 and 25 of the Complaint, SBC Illinois provided TDS Metrocom with calculations of the termination charges owed by Customer A on the Customer A Services Contract and the Customer A Centrex Contract and by Customer B on the Customer B Services Contract pursuant to letters of authorization (“LOA”) from Customer A and Customer B that authorized TDS Metrocom to request and receive the termination charge calculation on behalf of the customer. In other words, TDS Metrocom learned of the termination charges that it asserts in its Complaint are unreasonable and anticompetitive as a result of being given termination charge calculations for specific customers by SBC pursuant to LOAs from the customer. It was not until more recently that it became apparent to TDS Metrocom that SBC was discontinuing (or intending to discontinue) the practice of providing termination charge calculations to CLECs that presented customer authorization. Indeed, TDS Metrocom has not received an official notification of this change from SBC Illinois as a matter of SBC policy – footnote 2 of SBC’s Motion to Strike is the closest thing to an official statement by SBC that TDS Metrocom has seen that SBC intends to no longer provide termination charge calculations to CLECs.

4. SBC’s assertion that Question and Answer 12 must be stricken because outside the scope of relief requested in the Complaint and direct testimony are belied by examination of the *ASCENT* Order itself. It is clear from reading the *ASCENT* Order that the requirement for SBC to provide termination charge calculations as set forth in Finding (10) was not relief requested in the complaint in that docket or in the complainant’s testimony, but rather was a

requirement imposed by the Commission on its own initiative in order to make the relief it was ordering with respect to the manner in which termination charges should be determined and imposed, completely effective. The descriptions in the *ASCENT* Order of the complaint and the relief requested therein, and of the complainant's direct and rebuttal testimony and other arguments, contain no mention of any provisions of the type ordered in Finding (10). (See Order in Docket 00-0024, Jan. 3, 2002, p. 1; p. 2, first paragraph; Section II ("Complainant's Position"); Section IV ("Ascent's Response to Ameritech"); p. 13, first paragraph; Section VII.B; Section VII.C, first paragraph.) Rather, the Commission imposed the requirement in Finding (10) of the *ASCENT* Order based on a requirement imposed by the Public Service Commission of Ohio in a prior, similar order, even though the parties to the *ASCENT* case did not address this topic. This is clear from the following paragraph on page 30 of the *ASCENT* Order, which is the only place in that 38-page Order (other than Finding (10) itself and the related ordering paragraph) that discusses the requirement for SBC to provide termination charge calculations to CLECs that are authorized by the customer to receive the calculation:

Also, the Commission observes that the Ohio PUC wisely addressed issues that the parties here did not. In particular, the Ohio PUC apportioned responsibility and set forth procedures for calculating the discount to be returned to Ameritech. The Ohio PUC assigns calculation responsibilities to the carrier, once the customer has submitted an oral or written request. The Ohio PUC allows customers to use the CLECs as agents when requesting calculations. The calculated result must be provided to the customer or agent within three business days. In the event of a dispute, the carrier would bear the burden of justifying its calculation. In order to obviate the need for future administrative litigation regarding implementation of this Order, we will use this opportunity to require customers and Ameritech to adhere to the foregoing procedures when calculating ValueLink termination penalties in Illinois. (ASCENT Order, p. 30; emphasis added)²

²TDS Metrocom acknowledges that it is a disputed issue in this case as to whether SBC Illinois should be required to follow any of the requirements imposed by the Commission in the *ASCENT* Order – both by Finding (9) and by Finding (10) – for multi-year contracts for services other than the services specifically identified in the *ASCENT* case.

SBC Illinois requested rehearing with respect to the foregoing portion of the *ASCENT* Order on much the same theory that it advances in the Motion to Strike. The following is what SBC argued in its Application for Rehearing filed February 1, 2002, in Docket 00-0024:³

8. The Order also adopts a provision in the Ohio Order that required Ameritech Ohio to inform customers of the charges they would incur if they rescinded their contracts. Ohio Bell was required to calculate the charges within three business days after a request for such calculation by the customers or a CLEC acting as the customer's agent. Order, p. 28. *No party requested or suggested such a requirement in Illinois*, and there is no record evidence that such a requirement is necessary or reasonable. There is a vast difference between requiring Ameritech Ohio to provide calculations of termination charges during a limited "fresh look" period and requiring Ameritech Illinois to provide these calculations for an interminable period. The Commission should not rely upon an Order of a Commission in another state absent record evidence that the circumstances in the other state were directly comparable to the circumstances in Illinois. (Illinois Bell Telephone Company's Application for Rehearing in Docket 00-0024, filed Feb. 1, 2002, page 8; emphasis supplied)

Although the Commission issued an Order on Rehearing in Docket 00-0024 modifying certain descriptions of SBC's position as requested by SBC Illinois elsewhere in its Application for Rehearing, the Commission did not change the paragraph quoted above from the *ASCENT* Order nor did it change Finding (10). (See Order on Rehearing, Docket 00-0024, issued Feb. 20, 2002.)

5. Specific reference in Mr. Loch's rebuttal testimony to the provisions of Finding (10) of the *ASCENT* Order, and to a need for SBC to be required to provide termination charge calculations to CLECs that have customer authorization, is proper rebuttal. Mr. Loch's rebuttal testimony responds to the direct testimony of the SBC witnesses in which they explain SBC Illinois' newly-adopted (subsequent to the filing of TDS Metrocom's Complaint) termination

³SBC's Application for Rehearing in Docket 00-0024 is readily available on the Commission's e-docket system. To the extent necessary, TDS Metrocom requests that the ALJ take administrative notice of that pleading for purposes of ruling on the Motion to Strike.

liability provisions and contend that the requirements and limitations for SBC's termination charge provisions argued for by TDS Metrocom in its Complaint and direct testimony are not necessary and should not be ordered. Earlier in the rebuttal testimony Mr. Loch explains that SBC Illinois' new termination charge policies do not resolve the concerns that led TDS Metrocom to file its Complaint but that the new SBC policies are an improvement over the termination charge provisions that led TDS Metrocom to file its Complaint. (See Question and Answers 5-7 and 9 of TDS Metrocom Ex. 1.5.) As a result he recommends that the Commission either require SBC to adopt the form of termination charge provision that he described in his direct testimony for all of its multi-year tariff and contractual product and service offerings for business customers; or, if the Commission decides to allow SBC to use the "percent of remaining revenue" form of termination liability provision that SBC has now adopted and that its witnesses endorse, the Commission should establish "not to exceed" percent of remaining revenue percentages that are lower than those adopted by SBC in its new policy. (See Question and Answer 11 of TDS Metrocom Ex. 1.5.)

Then, in Question and Answer 12, Mr. Loch points out the importance of SBC Illinois being required to provide termination charge calculations to CLECs that have proper customer authorization, in order for *any* termination charge policy not to be unreasonable and anti-competitive. As he states: "A competitive local exchange carrier such as TDS Metrocom has absolutely no chance to compete with SBC Illinois for the business of a customer that SBC has signed to a long-term contract if we cannot obtain timely termination charge calculations from SBC." Thus his testimony in Answer 12 is proper rebuttal because it states a requirement (taken directly from the *ASCENT* Order) that must be in place in order for the new termination charge policies adopted by SBC (whether further modified by Commission directive or not) not to be

unreasonable and anti-competitive. (In this regard Mr. Loch's testimony directly parallels the Commission's own thought process in originally establishing this requirement at page 30 and Finding (10) of the *ASCENT* Order.)

6. The two cases cited by SBC in paragraph 4 of its Motion are inapposite and do not support its motion to strike, based on the facts and circumstances of this case. The record is still open in this case and no order has been issued by the Commission. As shown above, the testimony that SBC seeks to strike is based directly on a requirement imposed by the Commission in the *ASCENT* Order, the Order on which TDS Metrocom's Complaint was based. SBC Illinois cannot legitimately claim to be surprised by Question and Answer 12. More specifically, having discontinued (or indicated an intention to discontinue) the practice (that was directed by the *ASCENT* Order) which enabled TDS Metrocom to become aware of the specific facts that caused it to file its Complaint in the first place, SBC Illinois cannot legitimately claim that Question and Answer 12 are outside the proper scope of this case.

7. Without waiving any of the foregoing arguments, TDS Metrocom states that if the Administrative Law Judge concludes that SBC Illinois may be prejudiced by not having an opportunity to respond to Question and Answer 12 of TDS Metrocom Exhibit 1.5, TDS Metrocom would not object to SBC Illinois being allowed to file supplemental prepared testimony specifically responsive to Question and Answer 12 within a reasonable time. TDS Metrocom notes that there is still adequate time to complete this case within the one-year period provided for in 220 ILCS 5/10-108 (*i.e.*, by September 12, 2004).

WHEREFORE, TDS Metrocom respectfully requests that SBC Illinois' Motion to Strike be denied.

Respectfully submitted,

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